

No. 177

Office - Supreme Court,
FILED

JUN 11 1946

CHARLES ELMORE DROPP
OLE

IN THE
Supreme Court of the United States
OCTOBER TERM, 1945.

JOSEPH ALFANO,
Petitioner,
Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below,

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

✓ GEORGE R. SOMMER, Esq.,
*Attorney for and of Counsel
with Appellant,*
17 Academy Street,
Newark 2, New Jersey.

June, 1946.



INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
Reasons for Allowance of Writ.....	3
Conclusion	5

CITATION.

<i>United States v. Mann</i> , 95 U. S. 580, 24 L. Ed. 531..	4
--------------------------------------------------------------	---

STATUTES.

Title 18 U. S. C. A. Section 101.....	1, 2, 3
Judicial Code, Section 240(a).....	2



IN THE
Supreme Court of the United States
OCTOBER TERM, 1945.

JOSEPH ALFANO,
Petitioner,
Appellant below,
vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

To the Honorable the Supreme Court of the United States.
Your petitioner respectfully shows:

1. Joseph Alfano, petitioner herein, prays that a writ of certiorari issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit in the above entitled cause entered on May 14, 1946, sustaining a conviction of the petitioner for a violation of the Receiving Stolen Public Property Act, Title 18 U. S. C., Section 101.

Opinion Below.

The District Court did not file an opinion. The opinion of the Circuit Court of Appeals has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 14, 1946. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 25th, 1925.

Question Presented.

1. Does the indictment charge an offense?

Statute Involved.

Title 18 U. S. C. A. Section 101. (Criminal Code, Section 48.)

RECEIVING STOLEN PUBLIC PROPERTY. Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than \$5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

Statement.

An indictment was returned against Joseph Alfano and one, Patrick Cuttitta, attempting to charge them with a violation of the receiving Stolen Public Property Act, Title 18 U. S. C., Section 101 (R-3a). The defendant was tried on this indictment and the jury returned a verdict of guilty.

The Circuit Court of Appeals sustained the jury's verdict and held that though the indictment failed to allege all of the elements of the offense a fair construction of the same as a whole supplies the missing words.

The elements of the offense prohibited by the statute are, first, that the goods must have been stolen by someone other than the possessor; second, that they were the property of the United States; third, that the person possessing the same knew them to have been stolen; and fourth, that the possessor intended to convert them to his own use or gain.

Though the indictment charged the second, third and fourth elements of the offense it wholly failed to charge the first of the elements.

Reasons for Allowance of a Writ.

The Circuit Court of Appeals in effect decided that if an indictment is returned by a grand jury and fails to describe the offense defined in the statute a court may supply the missing words by construing the indictment and thus determine the intention of the grand jury.

The decision of the Circuit Court of Appeals conflicts with the decision of *United States vs. Mann*, 95 U. S. 580, 24 L. Ed. 531, and other representative cases.

In order that an indictment may charge an offense it must contain in it all of the elements of the crime prohibited by the statute.

The pertinent section of the code involved makes it an offense for anyone to retain in his possession, with intent to convert to his own use, any property of the United States which has theretofore been stolen by any other person, the person possessing the same knowing the same to have been stolen.

Therefore the elements of the offense are: First, that the goods must have been stolen by someone other than the possessor; second, that they were property of the United States; third, that the person possessing the same knew the same to have been stolen; and fourth, that the possessor intended to convert the same to his own use or gain.

The indictment in the instant case contains but three of these necessary elements, it does allege that the possessors knew the goods were stolen property and they intended to convert them to their own use and that the property was the goods and chattels of the United States, but it fails to set forth the other necessary element of the offense, namely; that the property had been stolen by someone other than the defendant.

Wherefore your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the

Third Circuit commanding the said Court to certify and send to this Court for its review and determination on a day certain to be designated a full and complete transcript of the record and all of the proceedings of the Circuit Court of Appeals in the said case, entitled in that Court, *United States of America vs. Joseph Alfano*, Appellant, No. 9113, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of the Circuit Court of Appeals be reversed by this Honorable Court and for such other and further relief as to this Court may seem proper and just.

Conclusion.

Your petitioner respectfully submits that the question presented by the foregoing petition shows a well defined conflict exists between the decision of the Circuit Court of Appeals and the decisions of this Court, that there is involved an important question of Federal Law and that this question should be reviewed by this Court.

Respectfully submitted,

GEORGE R. SOMMER,
Attorney for and of Counsel
with Petitioner.

June, 1946.

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement.....	2
Argument.....	4
Conclusion.....	7

CITATIONS

Cases:

<i>Bersio v. United States</i> , 124 F. 2d 310, certiorari denied, 316 U. S. 665.....	5
<i>Braateli v. United States</i> , 147 F. 2d 888.....	5
<i>Hagner v. United States</i> , 285 U. S. 427.....	5
<i>Keys v. United States</i> , 126 F. 2d 181, certiorari denied, 316 U. S. 694.....	7
<i>Knight v. United States</i> , 137 F. 2d 940.....	5
<i>Lamar v. United States</i> , 241 U. S. 103.....	5
<i>Mitchell v. United States</i> , 143 F. 2d 953.....	5
<i>Moore v. United States</i> , 128 F. 2d 974.....	5
<i>Reynolds v. United States</i> , — F. 2d —, certiorari denied April 22, 1946, No. 852, O. T. 1945.....	6
<i>Taylor v. United States</i> , 142 F. 2d 808, certiorari denied, 323 U. S. 723.....	6
<i>Tudor v. United States</i> , 142 F. 2d 206.....	7
<i>United States v. Streul</i> , 99 F. 2d 474, certiorari denied, 306 U. S. 638.....	7
<i>United States v. Wagoner</i> , 143 F. 2d 1, certiorari denied, 323 U. S. 730.....	7

Statutes:

Section 48 of the Criminal Code (18 U. S. C. 101).....	2
R. S. 1025 (18 U. S. C. 556).....	5

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 177

JOSEPH ALFANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 156-157) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 14, 1946 (R. 157-158). The petition for a writ of certiorari was filed on June 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether a conviction under Section 48 of the Criminal Code, punishing any person who receives, etc., property stolen from the United States "by any other person," should be reversed because the indictment did not expressly allege that the property had been stolen by someone other than the defendants.

STATUTE INVOLVED

Section 48 of the Criminal Code (18 U. S. C. 101) provides:

Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than \$5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

STATEMENT

An indictment in one count was returned against petitioner and another in the District Court for the District of New Jersey charging

that they "did have and retain in their possession with intent to convert to their own use and gains, property, goods and chattels of the United States to wit, 12 United States Navy sheepskin lined coats of the value of thirteen dollars and fifty cents (\$13.50) each, and of the total value of one hundred and sixty-two dollars (\$162), such property, goods and chattels having been therefore stolen and purloined and the said Joseph Alfano and Patrick Cuttitta knowing the same to have been so stolen and purloined; * * *" (R. 3). After a trial by jury, petitioner was found guilty and he was sentenced to imprisonment for two years and six months and to pay a fine of \$500 (R. 1-2). On appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed (R. 156-158).

It appears from the evidence that early in November 1944, 34 of 600 sheepskin coats which were being cleaned by a New Jersey establishment for the United States Navy were stolen from the cleaning plant (R. 5-8, 12-13). Shortly thereafter, petitioner had some of these coats on his premises (R. 115), which he attempted to sell (R. 38-40, 55). Petitioner testified that he was asked to store the coats by a man known to him only as "Jimmie" (R. 101-102), but admitted that he thought they were stolen because they were Navy coats. They were marked "Navy Department." (R. 39, 103, 116, 118.)

ARGUMENT

The only question raised by the petitioner is whether the indictment must now be held fatally defective because it did not allege a "necessary element of the offense, namely; that the property had been stolen by someone other than the defendant" (Pet. 4). At no time in the trial court did petitioner raise any objection to the sufficiency of the indictment in the usual ways as by demurrer, motion to quash, or motion in arrest of judgment (see R. 1-2, 72, 142-143). Moreover, the trial judge correctly summarized the elements of the offense at the outset of his instructions to the jury (R. 144) and stated in this regard that "it must appear to the jury that [the property] had been previously stolen by some person other than the defendant" (R. 145).

While it must be conceded that the indictment was inartfully drawn in not specifically charging that the property was stolen by some "other person," nevertheless we believe that the circuit court of appeals was correct in concluding "that a fair construction of the indictment, as a whole, supplies the missing words" (R. 157), for it alleged that the defendants had and retained in their possession the described property of the United States which had theretofore been stolen and that the defendants knew the property had been so stolen. The latter allegation as to knowledge, when read in the light of the preceding

allegations, fairly implies that the property had been stolen by a person or persons other than the defendants. In these circumstances, the case is controlled by R. S. 1025 (18 U. S. C. 556) which provides in pertinent part:

No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *.

The rule is firmly established that an indictment is sufficient even as against timely attack if it sets forth the essential elements of the offense charged with sufficient definiteness and certainty to apprise the defendant of the nature of the accusation against him and to protect him against further prosecution for the same offense. See, e. g., *Hagner v. United States*, 285 U. S. 427, 431-433; *Lamar v. United States*, 241 U. S. 103, 116; *Braatelian v. United States*, 147 F. 2d 888 (C. C. A. 8); *Mitchell v. United States*, 143 F. 2d 953 (C. C. A. 10); *Knight v. United States*, 137 F. 2d 940 (C. C. A. 8); *Moore v. United States*, 128 F. 2d 974 (C. C. A. 5); *Bersio v. United States*, 124 F. 2d 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665. In the *Hagner* case, this Court said (p. 433): "It, of course, is not the intent of § 1025 [R. S.] to dispense with the rule

which requires that the essential elements of an offense must be alleged; but it authorizes the courts to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict, at least [as in the instant case], no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." Obviously, petitioner was not prejudiced in making his defense by the failure to make the statutory allegation in question, or he would have made timely objection in the trial court. If the indictment left open the possibility that petitioner and not some other person was the thief, that was a fact of which he had the best knowledge and could have offered by way of defense. *Taylor v. United States*, 142 F. 2d 808 (C. C. A. 9), certiorari denied, 323 U. S. 723. Petitioner's testimony is inconsistent with any idea that he stole the property, and the trial judge instructed the jury that it must find that it was stolen by someone else. Additionally, petitioner's conviction here effectively bars a second prosecution for the same offense. This case is much the same as *Reynolds v. United States*, 152 F. 2d 586 (C. C. A. 5), certiorari denied April 22, 1946, No. 852, O. T. 1945, in which it was unsuccessfully urged that an indictment under the National Stolen Property Act was void because it failed to negative the defendant's ownership or right to possession of the stolen property.

Since it is clear that petitioner was neither misled nor prejudiced by the omission of which he complains, the indictment should not now be held invalid after a fair trial and verdict establishing his guilt beyond a reasonable doubt. See, e. g., *United States v. Wagoner*, 143 F. 2d 1 (C. C. A. 7), certiorari denied, 323 U. S. 730; *Keys v. United States*, 126 F. 2d 181 (C. C. A. 8), certiorari denied, 316 U. S. 694; *United States v. Strewel*, 99 F. 2d 474 (C. C. A. 2), certiorari denied, 306 U. S. 638; *Tudor v. United States*, 142 F. 2d 206 (C. C. A. 9).

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of substantial importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

✓ J. HOWARD McGRATH,
Solicitor General.

✓ THERON L. CAUDLE,
Assistant Attorney General.

✓ ROBERT S. ERDAHL,
✓ SHELDON E. BERNSTEIN,
Attorneys.

JULY 1946.